

No. 3073

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

CHARLES P. DOE, claimant of the steamship  
"George W. Elder", her engines, etc.,  
*Appellant,*

vs.

COLUMBIA CONTRACT COMPANY (a corporation),  
and UNITED STATES FIDELITY AND GUARANTY  
COMPANY, stipulators,  
*Appellees.*

**PETITION OF APPELLEE,**

**Columbia Contract Company, for Modification of Opinion.**

EDWARD J. McCUTCHEN,  
WOOD, MONTAGUE, HUNT & COOKINGHAM,  
McCUTCHEN, OLNEY & WILLARD,

Merchants Exchange Building

*Proctors for Appellee and Petitioner,  
Columbia Contract Company.*

FILED

MAY 1 - 1918

U. S. DISTRICT COURT  
SAN FRANCISCO, CALIF.



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## PETITION OF APPELLEE,

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*To the Honorable William B. Gilbert, Presiding Judge,  
and the Associate Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

The Columbia Contract Company, appellee herein, respectfully requests a modification of the opinion entered by this court herein on the 1st day of April, 1918.

On pages 64 and 65 of the brief for appellee we called attention to the fact that although appellee's

damages were assessed at the sum of \$41,839.83, a decree against the stipulator on the bond given for the release of appellant's vessel was entered in the sum of \$25,000 (Ap. 637). The decree of the lower court also imposes a liability upon appellant in the sum of \$9,991.65 on account of interest on the said sum of \$25,000 from May 1, 1910, to the date of the decree, and further imposes a judgment for costs incurred in the lower court against appellant. As the decree, upon familiar principles, could not provide for a judgment against the stipulator on the release bond in an amount in excess of its terms, and as the sureties on the cost bond in the court below are not liable for any amount in excess of their contract liability (\$250) and as the costs below in fact exceeded that sum, the appellee is without security for the judgment for interest and costs entered in its favor in the court below, and now affirmed by this court, unless it has recourse to the appeal bond.

It is for that reason that we, in our brief, requested this court to specifically direct the lower court to enter judgment for costs and interest against the Fidelity & Deposit Company of Maryland, the stipulator on the appeal bond.

By what we cannot but feel is simply an oversight, the opinion of this court is wholly silent upon the question and we, again, by this petition, respectfully request the court's consideration of it.

The authority for our request is found in

*The Wanata*, 95 U. S. 600; 24 L. ed. 461.

In that case damages were awarded in the sum of

\$16,000, which was precisely the amount of the stipulation for value. The decree of the lower court, however, did not provide for interests or costs against the stipulators on the bonds in that court. An appeal was taken to the Circuit Court, and an appeal bond in the sum of \$2000 given. In the latter court a decree was entered against the stipulators for value in the sum of \$16,000, and against the stipulator on the appeal bond in the sum of \$1407.47, which latter sum covered the costs taxed in the District Court as well as interest on the sum recovered in the latter court to the date of the decree of the Circuit Court. An appeal was then taken to the Supreme Court of the United States and that portion of the Circuit Court's decree specifically assigned as error. The Supreme Court affirmed the judgment of the Circuit Court, saying:

“Where the claimant appeals from the decree of the District Court, the bond and other stipulations follow the cause into the Circuit Court; and, upon the affirmation of the decree, *the fruits of the appeal bond and other stipulations may be obtained in the same manner as in the court below*, they being in fact nothing more than a security taken to enforce the original decree, and are in the nature of a stipulation in the admiralty.”

(Italics ours.)

See also

*The Southwark*, 129 Fed. 171.

The appeal bond given in this case by the Fidelity & Deposit Company provides that it

“will abide by and perform whatever decree may be rendered by the Appellate Court in the cause, or on the mandate of the Appellate Court by the court below \* \* \*.”

We respectfully submit, therefore, that, under its very terms, appellee is entitled to look to that bond to satisfy its judgment for interest and costs heretofore entered by the District Court, and now affirmed by this court. It may be that the court below upon the filing of the mandate may have authority to direct the payment of costs and interest out of the appeal bond, but to foreclose any possibility of a contrary contention, on the part of the appellant, and in view of the unquestioned propriety of such an order by this court, under the authorities, we respectfully ask that this court in its mandate direct the lower court to enter judgment for costs and interest against appellant and his stipulator on the appeal bond, the Fidelity & Deposit Company of Maryland.

Dated, San Francisco,  
May 1, 1918.

EDWARD J. McCUTCHEN,  
WOOD, MONTAGUE, HUNT & COOKINGHAM,  
McCUTCHEN, OLNEY & WILLARD,  
*Proctors for Appellee and Petitioner,*  
*Columbia Contract Company.*